(3)

No. 02-223

Supreme Court, U.S.
FILED

OCT 15 2002

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH ANGARONE and THOMAS McGANN,

Petitioners,

v.

JOSEPH P. IENCO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

# BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Amicus Curiae City
of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1027 or 788-1065

LEONARD J. KOERNER*
PAMELA SEIDER DOLGOW,
JOHN HOGROGIAN,
of Counsel.

*Counsel of Record

October 15, 2002

13pp

## TABLE OF CONTENTS


Page

Table of Authorities.....ii

Preliminary Statement.....1

Interest of the Amicus Curiae.....1

Summary of the Argument.....3

ARGUMENT

I. THE QUESTION PRESENTED IS OF GREAT IMPORTANCE.....4

II. THE HOLDING BELOW EFFECTIVELY OBLITERATES ABSOLUTE WITNESS IMMUNITY.....6

III. THE HOLDING BELOW IS COUNTER TO THE DECISIONS IN THE MAJORITY OF THE FEDERAL CIRCUITS, WHICH HAVE EXTENDED WITNESS IMMUNITY TO PRE-TRIAL CONDUCT.....7

CONCLUSION..... 9

## TABLE OF AUTHORITIES


**Cases** **Page**

Alioto v. City of Shively,
835 F.2d 1173 (6th Cir. 1987).....8

Briscoe v. LaHue,
460 U.S. 325 (1983).....5

Dory v. Ryan,
25 F.3d 81 (2d Cir. 1994).....8

Franklin v. Terr,
201 F.3d 1098 (9th Cir. 2000) .....7-8

Hunt v. Bennett,
17 F.3d 1263 (10th Cir.),
cert. denied, 513 U.S. 832 (1994).....8

Jones v. Cannon,
174 F.3d 1271 (11th Cir. 1999).....8

McArdle v. Tronetti,
961 F.2d 1083 (3d Cir. 1992) .....8

Miller v. Glanz,
948 F.2d 1562 (10th Cir. 1991) .....8

Moses v. Parwatikar,
813 F.2d 891 (8th Cir.),
cert. denied, 484 U.S. 832 (1987). .....8

Mowbray v. Cameron County,
274 F.3d 269 (5th Cir. 2001),
cert. denied, 122 S. Ct. 1912 (2002) .....7

San Filippo v.U.S. Trust Co. of New Jersey, Inc.,
737 F.2d 246 (2d Cir. 1984),
cert.denied, 470 U.S. 1035 (1985).....8

Watterson v. Page,
987 F.2d 1 (1st Cir. 1993) .....8

**Statutes**

42 U.S.C. § 1983..... passim

New York General Municipal Law § 50-k .....2

No. 02-223

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH ANGARONE and THOMAS McGANN,

Petitioners,

v.

JOSEPH P. IENCO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

# BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

## PRELIMINARY STATEMENT

The City of New York ("the City") submits this brief in support of the petition for a writ of certiorari in this matter.

## INTEREST OF THE AMICUS CURIAE

The City has a significant interest in having this Court grant the petition. The City is, of course, the nation's largest municipality. It is also probably the nation's single largest payer of tort judgments and settlements. In fiscal 2001, the City paid $557.3 million in resolution of tort claims. Approximately $15 million of that amount resulted from actions seeking damages under 42 U.S.C. § 1983.

Any increase in the City's tort exposure could have a negative impact on the provision of public services in a time of budgetary stringency.

Plaintiffs regularly bring actions under section 1983 against the City, claiming that City police officers had testified perjuriously in a prior criminal trial. Plaintiffs typically plead a cause of action against the City based on a theory of municipal policy or practice.

Even without a cause of action directly against the City, the public fisc is still at risk in actions of this nature. Under New York General Municipal Law § 50-k(2), the City will provide for the defense of an employee in a civil action if the Corporation Counsel finds that the alleged act or omission "occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred." Furthermore, pursuant to New York General Municipal Law § 50-k(3), the City "shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim approved by the corporation counsel and the comptroller" where the employee acted within the scope of duty and not in violation of any rule or regulation. The City will thus indemnify an employee for a judgment when the Corporation Counsel determines that the employee acted within his or her scope of duty, although not for intentional or reckless wrongdoing. Such tort exposure burdens the City's ability to provide basic services.

Additionally, as a major municipality, the City stands virtually alone with the City of Chicago. The Court of Appeals for the Second Circuit is the only other circuit that has denied absolute witness immunity for pretrial conduct that is merely preparatory to immunized testimony and has no independent impact on a defendant. The City has as much an interest in the resolution of this matter as the City of Chicago.

## SUMMARY OF THE ARGUMENT

The petition should be granted for three reasons. First, the question of immunity for pre-trial conduct that this matter presents is of profound importance for all municipalities, as suits premised on claims similar to those that gave rise to this matter are legion. Second, the decision of the Court of Appeals for the Seventh Circuit, if allowed to stand, practically obliterates the immunity long enjoyed by witnesses. Third, the Seventh Circuit's decision widens a divide among the federal courts of appeals on the issue presented, for now that court joins the Second Circuit as the only courts to deny immunity for the conduct of the sort presented here.

## ARGUMENT

### I. THE QUESTION PRESENTED IS OF GREAT IMPORTANCE.

Section 1983 suits against municipal governments are hardly rare. As we have noted, in fiscal 2001, the City alone paid approximately $15 million in damages under 42 U.S.C. § 1983, and frequently indemnifies its police officers for section 1983 judgments arising from actions its officers undertake within the scope of their duties. Although New York and Chicago are two of this country's largest cities, every municipality with a police force is liable under section 1983 for the steps its police department takes in the never-ending fight against crime.

This fight does not stop with a suspect's arrest. Convictions are seldom secured without the testimony of some member of the police department, be it the arresting officer, an investigating detective, or a member of the police crime lab. Indeed, testifying at a suspect's trial -- and frequently at hearings on pre-trial motions too -- is an integral part of a police officer's job.

It takes no stretch of the imagination to understand that many defendants who are prosecuted in the criminal justice system are displeased with treatment by that system. Even if acquitted, many defendants see themselves as victims of that process, and become convinced they were mistreated by police, prosecutor, judge, or jury. While allegations of such mistreatment are usually groundless, the defendant's desire for compensation is quite real, and so the officers who testified against him frequently find themselves defendants in a section 1983 action.

Regardless of the validity of such suits, the police's crime-fighting mission would be severely compromised

were the officers civilly liable for the testimony they gave in court, or even the requisite pre-trial actions they took to make that testimony possible. This Court recognized this very fact when it held that police officers are entitled to absolute immunity from liability for monetary damages in actions under section 1983 for their allegedly perjurious testimony at criminal trials. See Briscoe v. LaHue, 460 U.S. 325, 341-47 (1983). As this Court noted, "[t]his category of § 1983 litigation might well impose significant burdens on the judicial system and on law enforcement resources." Id. at 343. The cost of defending such cases would present great obstacles that very well may deter officers from zealously pursuing their duties, and prevent the government from allocating sufficient resources to the apprehension and prosecution of criminals. Indeed, as this Court recognized, even if the municipality or officer ultimately prevailed, the costs of defending that suit -- both financial and emotional -- are significant. See id. at 344.

The march of technology promises a surge in the filing of such cases. With increased use of DNA testing and similar processes, an increased number of incarcerated persons will be freed. These freed persons will understandably want financial recompense for their time of incarceration. Because prosecutors enjoy absolute immunity, municipalities and their police are certain to be targets in such suits, even when the police had acted in good faith, and simply lacked access to evidence generated by technologies yet to come into existence. A rule that exposes police officers to civil liability for pre-trial actions that are merely preparatory to immunized testimony would, perversely, saddle municipalities with huge financial liability for embracing cutting edge technologies to better ensure that only guilty defendants are convicted. This would, in turn, severely cripple a municipality's ability to employ these technologies.

## II. THE HOLDING BELOW EFFECTIVELY OBLITERATES ABSOLUTE WITNESS IMMUNITY.

If allowed to stand, the holding below will effectively abolish absolute witness immunity. Joseph Ienco ("Ienco') premises his due process claim on both the officers' pre-trial withholding of exculpatory information -- presumably the true facts about Ienco's search and seizure -- from the prosecutor, and on the officers' lying to the prosecutor by giving an untrue account of the arrest and search that would comport with the Fourth Amendment. (10a).[1] Telling a false story to the prosecutor in the pre-trial stage is inseparable from the telling of that story at trial. If an officer testifies falsely at a trial or a hearing, he or she as a matter of course has told that version of the facts to the prosecutor at the outset of the case. Indeed, the unavoidable first step in giving false testimony is the giving to the prosecutor of a preview of that testimony. Phrasing the claim as one of withholding the truth in the pre-trial stages of prosecution is just an attempt to defeat the absolute immunity of a witness. Hence, to preserve the well-established absolute immunity that witnesses enjoy, this immunity must be extended to pre-trial previews to prosecutors of false testimony.

If the Seventh Circuit is correct in the instant case, then witness immunity can almost always be nullified by creative pleading. The threat to witness immunity here is immediate and real. Understandably, persons who feel aggrieved by perjury in a trial or hearing have sought to evade the doctrine of witness immunity and to bring an action against the offending witness. Plaintiffs in section 1983 actions have engaged in clever parsing of events and

---

[1] Unless otherwise indicated, numbers in parentheses with the suffix "a" refer to pages in the Appendices to the Petition for a Writ of Certiorari.

concepts to circumvent witness immunity. Perhaps the most-used stratagem in this regard, although not employed by respondent here, is to disavow suing for the perjury itself and to base one's claim instead on a pre-trial conspiracy to present perjured testimony. Although clever, this conceptual ploy, if accepted, would eviscerate the traditional absolute immunity of witnesses, in that most perjurious testimony can be alleged to have sprung from a conspiracy between the witness and either another witness or a prosecutor. But of course this problem is not limited to allegations of conspiracy. As the Petitioners note, under the holding below, immunity for testimony is eviscerated by permitting section 1983 plaintiffs to reframe claims based on perjured testimony as based instead on the failure of police witnesses to disclose prior to trial facts inconsistent with their testimony, regardless of whether a conspiracy among police -- or among police and prosecutors -- is alleged. See Petition For A Writ Of Certiorari at 13-15 [hereafter, "Petition"].

## III. THE HOLDING BELOW IS COUNTER TO THE DECISIONS IN THE MAJORITY OF THE FEDERAL CIRCUITS, WHICH HAVE EXTENDED WITNESS IMMUNITY TO PRE-TRIAL CONDUCT.

The Courts of Appeals have mostly, although not unanimously, rejected this tactic, and have held that the absolute immunity witnesses enjoy for even perjured testimony also covers pre-trial conduct that is inseparable from that testimony. As the Petitioner noted, at least eight circuits have held that absolute testimonial immunity extends to pre-trial misconduct aimed at producing perjured testimony. See Petition at 7-9.[2]

---

[2] The Petition cites the following cases whose holdings directly conflict with the holding below: Mowbray v. Cameron County, 274 F.3d 269, 277-78 (5th Cir. 2001),

Prior to the instant case, the Court of Appeals for the Second Circuit stood alone in holding that a person can be sued pursuant to section 1983 for conspiracy to commit perjury in a prior trial or hearing despite the absolute immunity that covers the actual perjury. See San Filippo v. U.S. Trust Co. of New Jersey, Inc., 737 F.2d 246 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985); Dory v. Ryan, 25 F.3d 81, 82 (2d Cir. 1994). It appears now that, in the instant case, the Court of Appeals for the Seventh Circuit has joined the Court of Appeals for the Second Circuit in not extending absolute immunity to pre-trial precursors of courtroom testimony. This Court should resolve this conflict in the law by adopting the law prevailing in the majority of the Courts of Appeals, especially given that the law in the other circuits that have addressed this issue does not eviscerate absolute witness immunity as the decisions in the Second and Seventh Circuits have done.

But regardless of how the split in the circuits is settled, it is preferable that this conflict be resolved so that this important question of immunity is put to rest. The law in this area is in conflict and characterized by rhetorical hair-splitting used to evade the absolute immunity of witnesses. The City -- and indeed all municipalities -- will be better able to formulate a comprehensive means of handling these claims and will be able to more intelligently allocate its resources if the borders of witness immunity are

---

cert. denied, 122 S. Ct. 1912 (2002); Franklin v. Terr, 201 F.3d 1098, 1101-02 (9th Cir. 2000); Jones v. Cannon, 174 F.3d 1271, 1288-89 (11th Cir. 1999); Hunt v. Bennett, 17 F.3d 1263, 1267 (10th Cir.), cert. denied, 513 U.S. 832 (1994); Watterson v. Page, 987 F.2d 1, 9 (1st Cir. 1993); McArdle v. Tronetti, 961 F.2d 1083, 1085-86 (3d Cir. 1992); Miller v. Glanz, 948 F.2d 1562, 1570-71 (10th Cir. 1991); Alioto v. City of Shively, 835 F.2d 1173, 1174 (6th Cir. 1987); Moses v. Parwatikar, 813 F.2d 891, 892-93 (8th Cir.), cert. denied, 484 U.S. 832 (1987). See Petition at 7-8.

finally clearly drawn. This Court should accept this case as a vehicle to impose some order on this aspect of section 1983 jurisprudence.

## CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.**

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Amicus Curiae
City of New York.

LEONARD J. KOERNER,*
PAMELA SEIDER DOLGOW,
JOHN HOGROGIAN,
of Counsel.

*Counsel of Record